Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

STATE OF MAINE,

Petitioner,

v.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Fourth Amendment seizure occurs merely because a police officer taps on the window of a parked car in a public place and requests the driver to roll down the window.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Maine Law Court, By Deferring to the District Court's Faulty Seizure Determination, Contravened the Reasonable Person Standard and the Standards of Appellate Review Announced by this Court	9
II. The Maine Law Court has Decided an Important Issue of Fourth Amendment Law in a Way that Conflicts with Decisions of Federal Courts of Appeal, State Supreme Courts, and Other State Courts, as well as with this Court's Decisions	12
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Adams v. State, 758 S.W.2d 709 (Ark. App. Ct. 1988), *cert. denied*, 489 U.S. 1018 (1989) 15

Akins v. State, 596 S.E.2d 719 (Ga. App. 2004) 15, 16

Borowicz v. North Dakota Dep't of Transp., 529 N.W.2d 186 (N.D. 1995) 16

Cady v. Dombrowski, 413 U.S. 433 (1973) 21

Ebarb v. State, 598 S.W.2d 842 (Tex. Crim. App. 1979) 16

Ex Parte Betterton, 527 So.2d 747 (Ala. 1988) 15

Florida v. Bostick, 501 U.S. 429 (1991) 9, 16, 17, 18, 21

Florida v. Royer, 460 U.S. 491 (1983) 8, 9, 16, 17, 18

I.N.S. v. Delgado, 466 U.S. 210 (1984) 9, 16, 18

Medley v. State, 630 So.2d 163 (Ala. Crim. App. 1993), *rehearing denied*, 655 So.2d 61 (Ala. Crim. App. 1994), *cert. denied*, 665 So.2d 1033 (Ala. 1994) 15

Ornelas v. United States, 517 U.S. 690 (1996) 6, 8, 11

People v. Clark, 541 N.E.2d 199 (Ill. App. 1989) 14

People v. Murray, 560 N.E.2d 309 (Ill. 1990) 13

State v. Brewer, 1999 ME 58, 727 A.2d 352 6

State v. Chapman, 640 N.W.2d 566 (Wis. App. 2002) 16

State v. Gulick, 2000 ME 170, 759 A.2d 1085 7

State v. Knox, 939 P.2d 710 (Wash. Ct. App. 1997) 14

State v. O'Neill, 62 P.3d 489 (Wash. 2003) 14

TABLE OF AUTHORITIES – Continued

Page

State v. Smith, 223 S.E.2d 30 (Ga. App. 1975), *overruled*, 596 S.E.2d 719 (Ga. App. 2004) 16

State v. Thorn, 917 P.2d 108 (Wash. 1996) 14

State v. Zubizareta, 839 P.2d 1237 (Id. 1992) 14

United States v. Adegbite, 846 F.2d 834 (2d. Cir. 1988) 13

United States v. Baker, 290 F.3d 1276 (11th Cir. 2002) 13

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005) 12

United States v. Drayton, 536 U.S. 194 (2002) .....*passim*

United States v. Mendenhall, 446 U.S. 544 (1980) 6, 9, 17, 18

CONSTITUTIONAL PROVISION:

U.S. Const. amend. IV .....*passim*

STATUTUTORY PROVISIONS & RULES:

15 M.R.S.A. § 2115-A(5) 5

28 U.S.C. § 1257(a) 1

29-A M.R.S.A. § 2411(1) 3

29-A M.R.S.A. § 2412-(A)(1), (3) 3

M.R.App.P. 21(b) 5

M.R.Crim.P. 41A(d) 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

W. LaFave, "Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment 'Seizures'?" 1991 U.Ill.L.Rev. 729 (1991) 21

4 W. LaFave, *Search & Seizure*, § 9.4(a) at 433 (4th ed. 2004) 11, 21

4 W. LaFave, *Search & Seizure*, §9.4(c) at 440-453 (4th ed. 2004) 21

PETITION FOR A WRIT OF CERTIORARI

The State of Maine respectfully petitions for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court sitting as the Law Court (hereinafter "Maine Law Court") in this case.

OPINIONS BELOW

The opinion of the Maine Law Court (App. 1-9) affirming the Maine District Court's suppression order is reported at 2005 ME 26, 868 A.2d 188. The order of the Maine District Court granting respondent's motion to suppress (App. 10-13) is unreported.

JURISDICTION

The Maine District Court's May 26, 2004 oral order granting respondent's motion to suppress was entered in the criminal docket on June 1, 2004. The District Court's June 29, 2004 written findings of fact and conclusions of law were entered on July 1, 2004. The opinion of the Maine Law Court affirming the District Court's suppression order was both issued and entered in the Law Court docket on February 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Just after midnight on January 31, 2004, a University of Maine police officer was patrolling the south campus in Orono. (App. 2, 10). She observed what she considered to be suspicious operation by the driver of a red Saab. (App. 2, 10). She had been following the Saab when it turned into a university steam plant parking area. (App. 2, 10). The officer asked her supervisor, Sergeant Robert Norman, who was patrolling in an unmarked car, to observe any further operation of the red Saab. (App. 2, 11). She gave Sergeant Norman a description of the vehicle and told him that she had seen the vehicle turn into the university parking lot. (App. 11).

Sergeant Norman immediately proceeded to the steam plant parking lot. (App. 2, 11). He found the red Saab, and noticed that it was parked. (App. 2, 11). He could tell that the engine was running because he could see the exhaust on this very cold night. (App. 2, 11). Sergeant Norman parked his unmarked car far enough away from the red Saab that the driver of that car could have backed the car out if he wished to do so. (App. 3, 11). At no point did the sergeant activate the emergency lighting on his vehicle.

(M.T. 19).[1] The sergeant watched the red Saab for about five minutes and saw the windows begin to steam up. (App. 2-3, 11).

Sergeant Norman got out of his cruiser and approached the driver's side of the Saab. (App. 3, 11). He could see smoke emanating from the passenger side window. (App. 2, 11). While the sergeant could not see through the fogged-up back window of the Saab, he could see through the side window. (App. 3, 11).

Sergeant Norman, who was in uniform, approached the driver's window, and tapped, or rapped, on it with his knuckle. (App. 3, 12; M.T. 22). The sergeant, in a voice just loud enough to be heard over the running engine, then "asked" or "requested" the operator to "please roll down the window." (App. 3, 12; M.T. 28-30).

The driver, the respondent Joshua Patterson, did not roll the window down as the sergeant requested. (App. 3). Instead, he opened the driver's side door, and the sergeant made observations that led him to arrest the respondent for operating under the influence. (App. 3).

The respondent was later charged in the Maine District Court located at Bangor with Class D operating under the influence, in violation of 29-A M.R.S.A. § 2411(1), and Class E operating after suspension, in violation of 29-A M.R.S.A. § 2412-(A)(1), (3). (App. 3). Respondent entered pleas of not guilty and filed a motion to suppress the evidence seized after the sergeant asked

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[1] References to the transcript of the hearing on respondent's motion to suppress prepared by the State of Maine Electronic Recording Division shall be as follows: "(M.T.)."

him to roll down his window, arguing that the request constituted a Fourth Amendment seizure that was unsupported by reasonable articulable suspicion. (App. 3; M.T. 3, 31-33).

Following a testimonial hearing on the motion at which both officers testified but the respondent did not, the District Court granted the motion to suppress. (App. 4). After the arguments, the court stated, "the first question for the court is whether or not this was an inquiry or whether it was a command directive – a seizure." (M.T. 33). The court acknowledged that the respondent's failure to testify left it "open to question . . . whether he recognized it was a police officer tapping on the window." (M.T. 34). The court indicated that it was "going on the objective facts and then trying to plug in what probably was going on in his head." (M.T. 34).

After determining that there was no reasonable suspicion to justify a seizure, the court then returned to the question of whether the officer's words and conduct amounted to a request or an order:

> I don't have the defendant's testimony. I have the testimony of tap, tap, roll down the window or wind it down. Uniformed police officer – the Court's satisfied that on the evidence, hearing nothing more, it was a seizure not warranted, observations suppressed, and whatever came afterwards.

(M.T. 35). Following the hearing, the State filed a motion for findings of fact and conclusions of law pursuant to M.R.Crim.P. 41A(d). (App. 4). In its motion, the State specifically asked the District Court to "specify those

actions of Sergeant Norman which constituted a Fourth Amendment seizure."

The District Court issued written findings and conclusions on June 29, 2004. (App. 10-13). In its written order, the court found that Sergeant Norman, who was in uniform, rapped on the operator's window and "asked" the operator to roll down the window. (App. 12). The court further found:

> As indicated at hearing, the determining factor for the Court was whether or not this was a seizure or simply an interaction, a conversation, between the Sergeant and the Defendant. The factors that led the Court to conclude that it was a seizure are:
>
> 1. The officer was in uniform;
>
> 2. The officer initiated the contact under circumstance[s] in which an ordinary person in Defendant's situation would have expected privacy on public contact; [and]
>
> 3. The Sergeant rapped on the driver's side window and requested that the window be rolled down.

(App. 12). The Maine District Court then concluded as a matter of law "that more probably than not, [the] defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation." (App. 12).

After obtaining permission from the Attorney General pursuant to 15 M.R.S.A. § 2115-A(5) and M.R.App.P. 21(b), the petitioner filed an interlocutory appeal to the Maine Law Court from the Maine District Court's suppression

order. (App. 1, 4). On February 9, 2005, the Maine Law Court affirmed the order granting the motion to suppress. (App. 1-9).

The Maine Law Court identified the Fourth Amendment standard to be applied as "whether a reasonable person would have believed that he was not free to leave." (App. 5). *Citing United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Maine Law Court also noted that it would be independently reviewing whether the Maine District Court's historical findings of fact constituted a Fourth Amendment seizure as a matter of law. (App. 5). *See Ornelas v. United States*, 517 U.S. 690 (1996).

The Maine Law Court, in distinguishing one of its prior cases,[2] stated that the officer "made verbal contact with Patterson, telling him to roll down his window." (App. 6). The court found that the Maine District Court's oral comments after the suppression hearing and the last sentence of its written findings of fact and conclusions of law made clear that the Maine District Court had concluded that the officer's "request" was, in fact, an "order," and that a reasonable person would not feel free to disobey an order from a police officer. (App. 7). The Maine Law Court concluded that Sergeant Norman's "command" constituted an unreasonable seizure, and that the Maine District Court properly granted the motion to suppress. (App. 7).

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[2] *State v. Brewer,* 1999 ME 58, 727 A.2d 352, in which the Maine Law Court held that a driver of a parked car was not seized for Fourth Amendment purposes when two plainclothes detectives approached him while displaying their badges in their hands. *Id.* at ¶ 13, 727 A.2d at 355.

Later in its opinion, while again distinguishing one of its prior decisions,[3] the Maine Law Court found that "Sgt. Norman instructed Patterson to roll down the window." (App. 7). From this fact, the Maine Law Court concluded that "[t]he record supports the [district] court's conclusion that a reasonable person in Patterson's position would not 'feel free to decline the officer's requests or otherwise terminate the encounter.'" (*quoting United States v. Drayton*, 536 U.S. 194, 202 (2002)). (App. 7).

The Maine Law Court stated that this was "an admittedly close case," and that "[o]ther courts confronting similar facts have come to differing conclusions." (App. 8). The Maine Law Court observed that the case "turn[ed] on the precise nature of Sgt. Norman's statement, and how a reasonable person would interpret that statement." (App. 8). The Maine Law Court then stated, "As an appellate court, we decline to review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement." (App. 8). The Maine Law Court did not mention, however, that the Maine District Court made *no* findings of fact regarding the officer's tone and volume of voice. With respect to the circumstances, the Maine District Court found only that the officer rapped on the window and "asked" or "requested" that the respondent roll down his window. (App. 10-13). Finally, the Maine Law Court held that, "[b]ecause the trial court reasonably could have found that Sgt.

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[3] *State v. Gulick*, 2000 ME 170, 759 A.2d 1085, in which the Maine Law Court held that a driver of a car parked in a closed health care facility parking lot had not been seized for Fourth Amendment purposes when an officer approached the parked car and asked the driver if he was okay. *Id.* at ¶ 4, 759 A.2d at 1086.

Norman's comment constituted an order, we affirm the suppression order." (App. 8).

REASONS FOR GRANTING THE WRIT

There are two compelling reasons why this Court should review the Maine Law Court's decision in this case. First, the Maine Law Court did not apply the appropriate Fourth Amendment appellate standard of review in several respects. It effectively applied an erroneous subjective standard, in direct contravention of the objective "reasonable person" standard announced by this Court in *Florida v. Royer*, 460 U.S. 491 (1983) and its progeny, when it improperly deferred to the Maine District Court's seizure determination, a mixed question of law and fact requiring *de novo* review as announced by this Court's decision in *Ornelas v. United States*, 517 U.S. 690, 699 (1996), when it was readily apparent that the District Court had erroneously applied a subjective standard to make its legal determination. The Maine Law Court compounded its error by failing to defer to the Maine District Court's express findings of historical fact in apparent disregard of the applicable standard of review that this Court established in *Ornelas*.

Second, the Maine Law Court's decision that a Fourth Amendment seizure occurs when an officer taps or raps on the window of a car parked in a public place and verbally "requests" the driver to roll his window down, with no other show of authority, is in conflict with most decisions of the federal circuit courts of appeal and other state courts that have addressed similar factual scenarios. It also conflicts with this Court's decisions in *United States v.*

Drayton, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); and *Florida v. Royer*, 460 U.S. 491 (1983).

I. The Maine Law Court, By Deferring to the District Court's Faulty Seizure Determination, Contravened the Reasonable Person Standard and the Standards of Appellate Review Announced by this Court.

While the Maine Law Court properly articulated the appellate standard regarding whether respondent was seized (App. 5, 7) – namely, that it should review *de novo* the trial court's historical findings of fact to determine whether a reasonable person in the respondent's position would feel free to decline the officer's requests or otherwise terminate the encounter, *see United States v. Drayton*, 536 U.S. 194, 202 (2002), and *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) – it did not apply that standard. Instead, the Maine Law Court deferred to the District Court's seizure determination, even though the District Court applied an erroneous subjective standard. For that reason alone, this Court may wish to grant the petition and summarily reverse the decision of the Maine Law Court.

This Court has repeatedly held that the determination of whether or not a Fourth Amendment seizure has occurred is an *objective* test – would a reasonable person have felt free to ignore the officer's requests or otherwise terminate the encounter? *See, e.g., Florida v. Royer*, 460 U.S. 491, 502 (1983) (applying reasonable person test); *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (same); *Florida v. Bostick*, 501 U.S. 429, 436-437 (1991) (same); *United States v. Drayton*, 536 U.S. 194, 202 (2002) (same). The

District Court, however, applied a *subjective* test in determining as a matter of law whether respondent was seized within the meaning of the Fourth Amendment. The first indication of the trial court's misapprehension of the correct legal standard came at the suppression hearing, when the court stated that it was "going on the objective facts and then trying to plug in what probably was going on in [Patterson's] head." (M.T. 34). The trial court confirmed its error in its subsequent written findings of fact and conclusions of law when it stated that: "[t]he court finds that more probably than not, [the] *defendant perceived* the Sergeant's acts and words as a command from a police officer and not as a request for a conversation." (App. 12 (emphasis added)).

The Maine Law Court, while mouthing the correct standard, effectively applied that erroneous, subjective standard by deferring to the District Court's seizure determination. After acknowledging that this was a "close case," the Maine Law Court concluded that the District Court was in the best position to determine whether Sergeant Norman requested respondent to roll down the window of his car or ordered him to do so. (App. 8). Yet the Law Court did not defer to the specific historical facts found by the District Court. Rather, it deferred to the District Court's holding on the mixed question of law and fact as to whether those facts satisfied the constitutional standard, *i.e.*, amounted to a seizure. As demonstrated above, however, the District Court plainly violated this Court's precedents in how it decided that mixed question of law and fact.

Deferring to a ruling premised on a misapplication of Fourth Amendment law was not the Maine Law Court's only fundamental error. The Law Court also erred by

deferring *at all* to the District Court on the seizure determination. In *Ornelas v. United States*, 517 U.S. 690, 696-699 (1996), this Court held that an appellate court should review mixed questions of law and fact *de novo* in Fourth Amendment cases. Thus, the Maine Law Court violated two core Fourth Amendment principles announced by this Court – failing to independently review the lower court's seizure determination and deferring to a seizure determination based on a manifestly erroneous standard.

Had the Maine Law Court deferred not to the District Court's misguided seizure determination, but instead to the District Court's "findings of historical fact," as it should have, *see Ornelas*, 517 U.S. at 699, it could not have found that respondent was seized. The District Court expressly found as fact in this case, based on the officer's unrebutted testimony, that Sergeant Norman "asked" or "requested" the respondent to roll down his car window. (App. 12; M.T. 28-29). The Maine Law Court in its opinion, however, restated these findings as the officer "instruct[ing]," "telling," or "command[ing]" respondent to roll down the window. (App. 6, 7). The difference is more than semantic in this case, as "[a] request that the suspect . . . roll down the window would seem . . . permissible, but the same would not be true of an order that he do so." 4 W. LaFave, *Search & Seizure*, § 9.4(a) at 433 (4th ed. 2004) (collecting cases). *Ornelas* dictates that the Maine appellate court was not free to substitute its own factual findings for those rationally made by the trial court.

Using the proper standard of review established by this Court in *Ornelas*, the facts of this case are simple – the officer tapped on the window of the respondent's car and asked him to roll it down. The legal question that should have been independently addressed by the Maine

Law Court is whether a reasonable person under those circumstances would have felt free to disregard the officer's request. As the majority of the cases in the next section of this petition demonstrate, the Maine Law Court's conclusion that such a person would not have felt free to disregard the request was incorrect.

II. The Maine Law Court Has Decided an Important Issue of Fourth Amendment Law in a Way that Conflicts with Decisions of Federal Courts of Appeal, State Supreme Courts, and Other State Courts, as well as with this Court's Decisions.

A. The historical facts rationally found by the District Court are that the officer "asked" or "requested" a driver of a car parked in a public place to roll down the window. The Maine Law Court's holding that this amounts to a Fourth Amendment seizure directly conflicts with most other decisions of the federal and state courts that have considered similar factual scenarios.

1. Federal Court Decisions

• *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005): Reversing a contrary district court opinion, the Eighth Circuit recently held that a uniformed police officer did not seize the defendant for Fourth Amendment purposes when he parked his marked cruiser in front of the defendant's car, which was parked in an alley behind a shopping mall late at night, got out of the cruiser, approached the parked car with his flashlight on his badge and his hand on his holstered gun, and knocked on the window of the car three times. *Id.* at 1075. The Eighth Circuit stated that its

conclusion that there was no seizure on these facts until the officer ordered the occupants out of the vehicle was consistent with "scores of other cases holding similar police-citizen encounters did not implicate the Fourth Amendment." *Id.* (collecting cases).

- *United States v. Baker*, 290 F.3d 1276 (11th Cir. 2002): No Fourth Amendment seizure occurred when two plain-clothes police officers approached a running vehicle that had stopped only because of the traffic in front of it, displayed their badges, asked the vehicle's occupants to roll down their windows, and began asking questions of the occupants. *Id.* at 1277.

- *United States v. Adegbite*, 846 F.2d 834 (2d. Cir. 1988): No Fourth Amendment seizure occurred when two plain-clothes DEA agents waved for a moving truck to stop in a parking lot, identified themselves to the occupants as police officers, and asked the occupants for identification. *Id.* at 838.

2. State Supreme Court Decisions

- *People v. Murray*, 560 N.E.2d 309 (Ill. 1990): No Fourth Amendment seizure occurred when two uniformed police officers parked behind a car parked beside the highway; got out of their car and approached the window of the driver, who was apparently asleep; knocked on the window; and, upon the driver waking, asked him to get out of the car and produce some identification. *Id.* at 313. Interestingly, the Illinois Supreme Court reversed the intermediate court of appeals, which had held, contrary to the findings of the trial court, that the officers "commanded," "ordered," and "demanded" that the defendant exit the vehicle and produce identification. *Id.* Like the

Eighth Circuit, the Illinois Supreme Court stated that its decision was supported by "the great weight of authority." *Id.* (collecting cases). *See also People v. Clark*, 541 N.E.2d 199 (Ill. App. 1989) (officer's approach to vehicle parked in public place, tap on the window, and indication to driver to roll down the window does not constitute Fourth Amendment seizure).

- *State v. O'Neill*, 62 P.3d 489 (Wash. 2003): Interpreting its parallel state constitutional provision regarding searches and seizures, the Washington Supreme Court held that the driver of a vehicle parked in a public place had not been seized when an officer approached the driver, shined a flashlight in the driver's face, and asked the driver to roll down the window. *Id.* at 497-498. Relying on its prior decision in *State v. Thorn*, 917 P.2d 108 (Wash. 1996), which interpreted the Fourth Amendment, the state supreme court observed that because drivers of cars parked in public places do not have the same expectation of privacy as drivers of cars parked in private places, it is not an unreasonable intrusion for officers to approach drivers of vehicles parked in public parking lots to engage them in conversation. 62 P.2d at 497-498. *See also State v. Knox*, 939 P.2d 710, 714-715 (Wash. App. Ct. 1997) (officer's approach to driver parked on a ferry, repeated requests to roll down window, and engaging driver in conversation was not a Fourth Amendment seizure).

- *State v. Zubizareta*, 839 P.2d 1237 (Id. 1992): The driver of a car parked on a public street had not been seized when an officer approached him and requested that he roll down the window. *Id.* at 1242.

3. State Intermediate Appellate Court Decisions

- *Akins v. State*, 596 S.E.2d 719 (Ga. App. 2004): The court observed that "police officers may approach a citizen, ask for identification, *ask him to roll down a window* or step out of a car, and freely question him without any articulable suspicion, as long as the officers do not detain the citizen or create the impression that the citizen may not leave." *Id.* at 722 (emphasis added). In *Akins*, a police officer, who was concerned for the safety of a female passenger in a car parked beside a private baseball park, parked his cruiser, approached the passenger side of the car and asked the woman to roll down her window. *Id.*

- *Medley v. State*, 630 So.2d 163 (Ala. Crim. App. 1993): No reasonable suspicion was required when a state trooper stopped to offer assistance to the driver of a car parked on the shoulder of a public road, tapped on the window and requested the driver to roll down the window. *Id.* at 165. The appeals court relied on the Alabama Supreme Court's opinion in *Ex Parte Betterton*, 527 So.2d 747 (Ala. 1988), in which the state supreme court held that no Fourth Amendment seizure had occurred when two police officers parked their cruiser, with its bright lights on, either behind or beside a car parked in a public park, approached and knocked on the driver's window.

- *Adams v. State*, 758 S.W.2d 709, 709-710 (Ark. App. Ct. 1988), *cert. denied*, 489 U.S. 1018 (1989): No Fourth Amendment seizure occurred when a police officer pulled his cruiser in behind a car parked in the dark beside a high school, shined a spotlight on the car, got out of his cruiser, approached the driver's side window, tapped on the window and asked the driver for identification.

• *State v. Chapman*, 640 N.W.2d 566 (Wis. App. 2002): No Fourth Amendment seizure occurred when a uniformed police officer in a marked cruiser got out of his cruiser, approached a car that was backing out of a parking spot in a tavern parking lot, knocked twice on the window, and asked the driver to roll down the window. *Id.* The court of appeals held that the officer, like any citizen, had the right to approach the parked car, rap on the window, and ask the driver to lower the window. *Id.*

In contrast to these decisions, the North Dakota Supreme Court, in *Borowicz v. North Dakota Dep't of Transp.*, 529 N.W.2d 186 (N.D. 1995), held that an officer's request to the driver of a car parked on a public street to open the door and produce his license "arguably" could be a Fourth Amendment seizure. *Id.* at 188. The state supreme court observed that the requests "could be interpreted as an order 'to do something' depending on how it was made." *Id. See also Ebarb v. State*, 598 S.W.2d 842 (Tex. Crim. App. 1979) (observing in dicta that when a person is sitting in a parked car and an officer orders the person to roll down the window or to open the car door, "there is at that point a temporary seizure." *Id.* at 850 (*citing State v. Smith*, 223 S.E.2d 30 (Ga. App. 1975)).[4]

B. This Court's prior decisions in *United States v. Drayton, Florida v. Bostick, I.N.S. v. Delgado*, and *Florida v. Royer* also dictate as a matter of law that a Fourth Amendment seizure has not occurred merely because a police officer has "requested" a citizen to do something.

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[4] *Smith* has been overruled by the Georgia Court of Appeals. *See Akins*, 596 S.E.2d at 722.

In *Florida v. Royer*, 460 U.S. 491 (1983), a majority of the Court first adopted the Fourth Amendment seizure standard originally articulated by Justice Stewart (joined by then-Associate Justice Rehnquist) in *United States v. Mendenhall*, 446 U.S. 544, 555 (1980), that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Royer*, 460 U.S. at 502-503, 514-515, 524. Later, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Court recognized that for situations such as the present case, where the person is in a location that the person has no desire to leave, "the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 436.

Justice Stewart, in *Mendenhall*, provided examples of circumstances that might indicate a seizure had taken place, including, "[t]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 555. Justice Stewart, along with current-Chief Justice Rehnquist, would have held in that case that a seizure did not take place merely because law enforcement officers approached the defendant in a public place, asked her for identification, and posed a few questions to her. *Id.* at 556.

The four justice plurality in *Royer* (Justice White, joined by Justices Stevens, Marshall, and Powell) agreed with Justice Stewart's position: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another

public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." 460 U.S. at 497. Three dissenting justices (then-Associate Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor) agreed with the plurality that the defendant had not been seized when two detectives approached him in an airport concourse, identified themselves as officers, asked to speak to him, and asked for his airline ticket and for some identification. *Id.* at 524 n. 3.

In *I.N.S. v. Delgado*, 466 U.S. 210 (1984), then-Associate Justice Rehnquist, writing for a majority of the Court, stated that

> "[p]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. . . . Unless the circumstances of the encounter are so intimidating that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment."

Id. at 216. The Court held that immigration agents did not violate the Fourth Amendment when they approached employees in a factory, asked them questions, and requested identification while other agents were posted at the exits. *Id.* at 212.

The Court first applied the *Mendenhall-Royer* standard to a suspicionless narcotics interdiction bus sweep in *Florida v. Bostick*, 501 U.S. 429 (1991). The Court held that the Florida Supreme Court erred when it "adopted a *per se* rule prohibiting the police from randomly boarding buses as a means of drug interdiction." *Id.* at 435, 440.

Justice O'Connor, writing for a six-Justice majority, stated that "if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure." *Id.* at 434. The Court, while remanding to the state court to decide the seizure issue in the first instance using the proper legal standard, observed that there was "some doubt whether a seizure occurred" when two officers approached the defendant on the bus, asked for his ticket and identification, and requested his consent to search his luggage. *Id.* at 437.

In a similar case eleven years later, *United States v. Drayton*, 536 U.S. 194 (2002), the Court expressly held that a Fourth Amendment seizure did not take place when three officers conducted another suspicionless narcotics interdiction operation on a bus. Justice Kennedy, writing for another six-Justice majority, stated:

> There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not of its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her own decision not to cooperate with police on a bus than in other circumstances.

Id. at 204.

When Sergeant Norman's conduct is objectively measured against other police conduct already found by this Court *not* to have constituted a seizure, it is evident

that he did not seize respondent. As in *Drayton* and its predecessors, there was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, and no threat. In contrast to *Drayton* and its predecessors, and presenting a less coercive presence than the officers did in *Drayton*, Sergeant Norman was alone when interacting with respondent, and never touched respondent before asking him to roll down the window.

Additionally, there is no evidence that Sergeant Norman used an authoritative tone of voice when he asked respondent to roll down his window. In fact, the Maine Law Court recognized that the officer prefaced his request with the word "please." (App. 3). While the Maine Law Court also declined to draw its own inferences regarding the officer's tone of voice from the appellate record, the Maine Law Court failed to mention that the trial court did not articulate any findings regarding the officer's tone of voice despite the petitioner's specific request that the court identify all factors it had considered to conclude that the officer had seized respondent.

Unquestionably, if respondent had been standing outside of his vehicle, or even sitting in his vehicle with the window down, Sergeant Norman would have been free to approach him, ask him some questions, and request identification without implicating the Fourth Amendment. This Court's precedents, as well as the vast majority of other federal and state courts, strongly suggest that the mere fact that the officer requested respondent to remove the barrier to such a conversation, his window, should not change that result.

Law enforcement officers are called upon to interact with motorists in parked cars on a frequent, perhaps daily,

basis. This Court recognized over thirty years ago in *Cady v. Dombrowski*, 413 U.S. 433 (1973) that "[t]he extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Id.* at 441. The level of suspicion, if any, that a law enforcement officer must possess before approaching a parked car and requesting the operator to roll down the window under these circumstances is an important, recurring question that this Court should resolve.

Even Professor LaFave, the noted Fourth Amendment commentator and a harsh critic of this Court's *Bostick* and *Drayton* opinions (*see, e.g.*, W. LaFave, "Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment 'Seizures'?," 1991 U.Ill.L.Rev. 729 (1991); 4 W. LaFave, *Search & Seizure*, §9.4(c) at 440-453 (4th ed. 2004)), has acknowledged that "the mere approach and questioning of . . . persons [seated in parked vehicles] does not constitute a seizure." *Id.* at § 9.4(a) at 433. Moreover, he continues, "[t]he result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to the conversation." *Id.*

This case presents this Court with an opportunity to harmonize the split in authority regarding this important issue of Fourth Amendment law that the Maine Law Court recognized in its decision (App. 8) by holding that the Fourth Amendment is not implicated merely because a law enforcement officer has requested the driver of a vehicle parked in a public place to remove the barrier to an entirely constitutional conversation.

CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Maine Law Court, or, in the alternative, set the case for a hearing on the merits.

Respectfully submitted,

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APPENDIX

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2005 ME 26
Docket: Pen-04-444
Submitted
On Briefs: December 8, 2004
Decided: February 9, 2005

Panel: SAUFLEY, C.J., and CLIFFORD, *DANA*, ALEXANDER, and CALKINS, JJ.

STATE OF MAINE

v.

JOSHUA PATTERSON

DANA, J.

[¶1] The State of Maine appeals from a judgment entered in the District Court (Bangor, *Russell, J.*) granting Joshua Patterson's motion to suppress evidence obtained after a University of Maine police officer approached his parked vehicle. The State argues that Patterson was not seized within the meaning of the Fourth Amendment, and that the evidence should have been admitted in the State's prosecution of Patterson for OUI (Class D), pursuant to 29-A M.R.S.A. § 2411(1) (1996),[1] and operating after suspension (Class E), pursuant to 29-A M.R.S.A. § 2412-A(1), (3) (1996).[2] Because the

[1] Title 29 M.R.S.A. § 2411(1) was repealed and replaced by P.L. 2003, ch. 452 §§ Q-77 to Q-83 (effective July 1, 2004), *codified at* 29-A M.R.S.A. § 2411(1-A) (Supp. 2004).

[2] Title 29-A M.R.S.A. § 2412-A(1) was repealed and replaced by P.L. 2003, ch. 452 §§ Q-84 to Q-85 (effective July 1, 2004), *codified at* 29-A M.R.S.A. § 2412-A(1-A) (Supp. 2004). Title 29-A M.R.S.A. § 2412-A(3) was amended by P.L. 2003, ch. 673 § TT-5 (effective July 30, 2004), *codified at* 29-A M.R.S.A. § 2412-A(3) (Supp. 2004).

record supports the court's determination that the officer seized Patterson by ordering him to roll down his window, we affirm.

I. BACKGROUND

[¶2] The facts of this case are not disputed. Shortly after midnight on January 31, 2004, a University of Maine campus police officer observed Patterson's automobile, a red Saab, driving on the south end of the campus. The officer observed the driver engage his turn signal and slow down as the Saab approached an intersection. Before the turn, however, the driver disengaged the turn signal and continued down the road. The police officer began to follow the Saab, but she did not engage the cruiser's emergency lights.

[¶3] The cruiser followed Patterson's vehicle until it turned into a frequently used parking lot and pulled into a marked, legal parking space. The officer did not observe any traffic violations or other illegal conduct. She later testified that she was suspicious of the vehicle because of the initial, aborted turn and its "slightly erratic" acceleration and deceleration.

[¶4] After Patterson's car pulled into the parking space, the patrol officer used her police radio and requested that another officer in an unmarked vehicle take over surveillance. Sgt. Robert Norman responded to the request. Upon arriving in the parking lot, Sgt. Norman noticed that the Saab's engine was still running. He saw the car's rear window begin to fog up, and noticed what appeared to be cigarette smoke coming from the passenger side.

[¶5] After observing the car for five minutes, Sgt. Norman pulled his unmarked car around the row of vehicles and parked it in a spot out of view of those inside the Saab. Sgt. Norman, who was wearing his uniform, got out of his car and approached Patterson's car. He later testified that he was suspicious because the occupants had remained in the car on a cold night, rather than exiting the vehicle and proceeding indoors. He suspected that the occupants might be using drugs or drinking alcohol inside the car.

[¶6] As Sgt. Norman approached the driver's side of the Saab, he saw that the door was shut and the windows were closed. There were other vehicles parked in front of and beside Patterson's, but Sgt. Norman testified that he did not block Patterson's vehicle from backing out. Sgt. Norman looked through the car's side window and saw two people inside the vehicle. He observed nothing illegal. He tapped on the window, and said, in a voice loud enough to be heard over the engine, "please roll down the window."

[¶7] After Sgt. Norman tapped on the window, Patterson responded by opening the driver's side door. At that time, Sgt. Norman testified that he smelled cigarette smoke and alcohol, and he ordered Patterson out of the vehicle. Patterson was later charged with OUI (Class D), pursuant to 29-A M.R.S.A. § 2411(1), and operating after suspension (Class E), pursuant to 29-A M.R.S.A. § 2412-(A)(1), (3). Patterson entered a plea of not guilty, and filed a motion to suppress all evidence obtained after Sgt. Norman told Patterson to roll down the window. At the hearing on the motion, the trial court heard testimony from the two police officers who saw Patterson's vehicle that night.

[¶8] After the hearing, the court granted the motion to suppress on the grounds that Patterson was seized in the absence of any articulable suspicion for the seizure and therefore in violation of the Fourth Amendment. The State subsequently moved the court to enter findings of fact pursuant to M.R. Crim. P. 41A(d). The court granted the motion. In its written findings of fact, the court cited three factors that weighed in favor of its conclusion that a seizure took place: (1) Sgt. Norman was in uniform; (2) Patterson had an expectation of privacy inside his car; and (3) Sgt. Norman rapped on the driver's side window and requested that the window be rolled down. The court concluded that "more probably than not, the defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation."

II. DISCUSSION

[¶9] The State appeals the suppression ruling, arguing that because no detention or stop occurred, Sgt. Norman's conduct did not violate Patterson's Fourth Amendment rights. The State does not argue that the police had the requisite articulable suspicion to detain Patterson at the time Sgt. Norman approached the vehicle.[3] Therefore, the only issue we must decide is whether

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[3] The police may make brief, investigatory stops of people on the basis of "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Moulton,* 1997 ME 228, ¶ 10, 704 A.2d 361, 364 (quoting *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). Although the State raised the reasonable suspicion standard at the motion hearing, its brief to this Court does not argue that this encounter qualifies as a *Terry* stop.

(Continued on following page)

Sgt. Norman's actions constituted a seizure for purposes of the Fourth Amendment.

[¶10] The Fourth Amendment to the U.S. Constitution, and Article 1, Section 5 of the Maine Constitution, offer identical protection against unreasonable searches and seizures. *State v. Gulick,* 2000 ME 170, ¶ 9 n.3, 759 A.2d 1085, 1087. "An encounter between a police officer and a citizen implicates the Fourth Amendment only if the officer 'seizes' the citizen." *State v. Cilley,* 1998 ME 34, ¶ 7, 707 A.2d 79, 82. A seizure occurs when an officer, by a show of authority, in some way restrains a citizen such that "he is not free to walk away." *Id.* (quotation marks omitted). The test for whether a seizure has occurred is an objective one, i.e., whether a reasonable person would have believed that he was not free to leave. *See United States v. Mendenhall,* 446 U.S. 544, 554 (1980).

[¶11] The State does not dispute the factual findings entered below, but contends that the trial court erred as a matter of law in determining that Patterson was seized when Sgt. Norman tapped on his window and spoke to Patterson. We review independently whether a court's historical findings of fact constitute a seizure for Fourth Amendment purposes. *State v. Brewer,* 1999 ME 58, ¶ 10, 727 A.2d 352, 355.

[¶12] In *Brewer,* we determined that two police officers did not "seize" a motorist when they held out their badges and approached a parked vehicle. *Id.* ¶ 13, 727 A.2d at 355. We noted that "the agents did not display any weapons, position their vehicle to prevent Brewer from

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Issues not briefed to this Court are not preserved. *Holland v. Sebunya,* 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209.

leaving, *give oral instructions to Brewer or Noyes,* or activate the police lights." *Id.* ¶ 13, 727 A.2d at 356 (emphasis added). We also noted that a seizure may occur by "the use of language or tone of voice that would indicate that compliance with the officer's request might be compelled." *Id.* ¶ 12, 727 A.2d at 355 (quoting *Mendenhall,* 446 U.S. 544, 554 (1980)).

[¶13] Unlike the agents in *Brewer,* the police officer in this case made verbal contact with Patterson, telling him to roll down his window. Whether this communication was sufficient to effect a seizure depends upon whether it was a polite request, or a command:

> [T]he mere approach and questioning of such persons does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. *A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so.*

WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE § 9.4(a) at 433 (2004) (emphasis added).

[¶14] The record reveals that the trial court was attuned to the significance of Sgt. Norman's statement to Patterson. At the hearing, immediately after listening to Sgt. Norman's testimony, the court identified the issue as whether Patterson "heard a request, which is . . . no problem or an order which raises questions of a seizure." The court concluded that based on the officer's conduct, a seizure occurred. The subsequent written findings of fact

reiterate the court's belief that Sgt. Norman's statement constituted an order.[4] Because a reasonable person would not feel free to disobey an order from a police officer, Sgt. Norman's command constituted a seizure, and the evidence obtained thereafter was properly suppressed.

[¶15] The State argues that our opinion in *Gulick* requires a different outcome. *Gulick* involved a driver who pulled into the parking lot of a closed medical care facility late at night. *Gulick,* 2000 ME 170, ¶ 17, 759 A.2d at 1089. The officer approached the vehicle and asked if the driver was okay. *Id.* ¶ 4, 759 A.2d at 1086. In this case, Sgt. Norman observed a vehicle parked among other cars in a well-used university parking lot. He did not have any concerns about the safety of the driver; rather, he was concerned that students might be drinking or smoking marijuana in the vehicle. Upon approaching the car, he did not smell any marijuana and saw no signs of illegal activity. Without any evidence that Patterson was in distress or acting illegally, Sgt. Norman instructed Patterson to roll down the window. The record supports the court's conclusion that a reasonable person in Patterson's position would not "feel free to decline the officers' requests or otherwise terminate the encounter." *United States v. Drayton,* 536 U.S. 194, 202 (2002) (quotation marks omitted).

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[4] The State points to the court's written findings of fact, in which the court wrote that Sgt. Norman "rapped on the driver's side window and requested that the window be rolled down." According to the State, this constitutes a finding that Sgt. Norman's communication was a request, not an order. The court's very next sentence, and its comments at the hearing, make it clear that the court determined that the "request" was, in fact, an order that Patterson reasonably believed he could not ignore.

[¶16] This is an admittedly close case,[5] turning on the precise nature of Sgt. Norman's statement, and how a reasonable person would interpret that statement. The trial court heard the testimony of Sgt. Norman. As an appellate court, we decline to review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement. *See Lewisohn v. State,* 433 A.2d 351, 354 (Me. 1981). Because the trial court reasonably could have found that Sgt. Norman's comment constituted an order, we affirm the suppression order.

The entry is:

Judgment affirmed.

Attorneys for State:

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[5] Other courts confronting similar facts have come to differing conclusions. *See Borowicz v. North Dakota Dep't of Transp.,* 529 N.W.2d 186, 188 (N.D. 1995) (stating that stop arguably occurred when officer's instruction to open the door could be interpreted as an order); *Ebarb v. State,* 598 S.W.2d 842, 850 (Tex. Crim. App. 1979) (holding that officer's order to roll down window or open door creates a temporary seizure); *but see Akins v. State,* 596 S.E.2d 719, 722 (Ga. App. 2004) (holding that police may approach citizen and ask that he roll down the window, "as long as the officers do not detain the citizen or create the impression that the citizen may not leave"); *Medley v. State,* 630 So.2d 163, 165 (Ala. Crim.App. 1993) (holding that officer did not seize motorist when he tapped on window and asked driver to roll it down).

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STATE OF MAINE
PENOBSCOT, ss.

DISTRICT COURT
BANGOR
DOCKET NO: CR-04-850

STATE OF MAINE

v.

JOSHUA PATTERSON

FINDINGS OF FACT ON MOTION TO SUPPRESS

Just after midnight on January 31st Officer Nickerson of the University Police was patrolling the south campus. As she brought her cruiser to a stop on Sebago Road, she noted a vehicle proceeding northbound, coming from her left, on Munson Road. The operator of the second vehicle turn on directional signals indicating a left turn about 120' before the intersection. While Nickerson asserted that the blinker was on for an abnormally long distance before the turn, the law requires the signal to be made "at least 11 feet" before the turn. 29-A M.R.S.A. § 2071(2).

As the car passed the officer, she pulled out to follow. As she began to follow the car, Officer Nickerson radioed her supervisor to relate her continuing observations of the second car. The second car, having first slowed in preparation for a turn, resumed normal speed and the blinker was turned off. A short distance later the two vehicles came to a stop sign. The second car stopped appropriately and made a left turn onto a short street leading to College Avenue. At College Avenue the second car took another left and shortly thereafter turned into a University parking area at the steam plant.

Officer Nickerson was suspicious of the car's operation because of the apparent change in mind of the operator as to the turn and that the change of mind took place in

proximity to her marked police cruiser. She asked her Sergeant, who was patrolling in an unmarked car, to observe any further operation of the vehicle she was following. She described the vehicle as a red Saab and its entry into the steam plant parking lot.

Sergeant Norman was patrolling a short distance away. He immediately proceeded to the steam plant lot, spied the red Saab and noted that it was appropriately parked. It was a very cold evening and he also noted that the engine was still running in the Saab because he could see the exhaust.

The Sergeant watched the red Saab for about five minutes and saw the windows begin to steam up. He got out of his cruiser and approached the Saab and saw smoke emanating from the passenger side window. Amongst the various activities that could have been occurring in a parked car at that time of night, the Sergeant opined that smoking marijuana or consuming alcohol were two alternatives. He made no effort to detect whether the smoke was marijuana although he was able to note that it was cigarette smoke as he confronted the driver. He made no observations of any movements that would indicate that anyone in the vehicle was drinking. While the back window of the car was fogged up so he could not see through it, he was able to see through the side window.

Sergeant Norman had parked his car some distance away. He approached the red Saab from the driver's side. Had the operator wished to back out of the parking spot (there were cars on each side and in front of the Saab), he could have done so without harm to the officer.

Sergeant Norman was in uniform. He rapped on the operator's window and asked the operator to roll the window down.

As indicated at hearing, the determining factor for the Court was whether or not this was a seizure or simply an interaction, a conversation, between the Sergeant and the Defendant. The factors that led the Court to conclude that it was a seizure are:

1. The officer was in uniform;
2. The officer initiated the contact under circumstance in which an ordinary person in Defendant's situation would have expected privacy on public contact;
3. The Sergeant rapped on the driver's side window and requested that the window be rolled down.

The court finds that more probably than not, defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation.

Officer Nickerson acknowledged that she saw nothing that would warrant a stop of the vehicle. The sole reason for the Sergeant in taking the action that he did, temporarily seizing defendant, was that the occupants of the red Saab stayed in the car while parked for approximately five minutes after it came to a halt. Norman repeatedly commented on the oddity of the occupants remaining in the car in such cold weather. Since the engine was running, one could safely assume the heater was also running. The Sergeant saw nothing other than the smoke emanating from the driver's side window, which he was able to quickly identify as cigarette smoke when he neared the

car, that would substantiate his hunch that the occupants of the car were either consuming alcohol or smoking marijuana.

The Clerk shall enter the following on the docket:

"Findings of Fact on Motion to Suppress Filed."

Dated: June 29, 2004

/s/ Ronald D. Russell
Ronald D. Russell
Judge, Maine District Court